91-769 (1)



CASE NO.:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

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ARTHUR ALVIN FAMBRO,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Attorney for Petitioner

## QUESTION PRESENTED

Whether a warrantless search and seizure of a person is unreasonable under the Fourth Amendment to the United States Constitution where there is no probable cause to arrest, and no articulable or particularized circumstances to provide the basis for a "stop and frisk" weapon pat-down?

## CERTIFICATE OF INTERESTED PERSONS

The following persons have an interest in the outcome of this appeal:

1. ARTHUR ALVIN FAMBRO, PETITIONER;

2. HONORABLE DUDLEY H. BOWEN, JR., JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA;

3. HONORABLE JOHN DUNSMORE, JR., UNITED STATES MAGISTRATE FOR THE SOUTHERN DISTRICT OF GEORGIA;

4. HINTON R. PIERCE, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF GEORGIA;

5. J. MICHAEL FAULKNER, ASSISTANT UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF GEORGIA; AND

6. CURTIS L. JONES, JR., ATTORNEY FOR PETITIONER.

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## OPINIONS BELOW

The Court of Appeals' Order on Petition for Rehearing and Suggestion of Rehearing En Banc is included as Appendix A, infra. The Opinion of the Court of Appeals is included as Appendix B, infra. The District Court's Order on the Defendant's Motion to Suppress is included as Appendix C, infra. The Magistrate's Report and Recommendation is included as Appendix D, infra.

## STATEMENT OF JURISDICTION

The Opinion of the Court of Appeals was entered on May 24, 1991. A timely Petition for Rehearing, with suggestion for rehearing en banc, was denied by Order of the Court of Appeals entered on July 24, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

## CONSTITUTIONAL AMENDMENT INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT

### A. The Facts

On February 27, 1990, the Appellant, ARTHUR ALVIN FAMBRO, along with five (5) Black males, were standing in the parking lot of a McDonald's restaurant located in Augusta, Georgia. Suddenly, and without any prior warning, approximately fifteen (15) law enforcement officers converged upon the restaurant and its parking lot. At that time, the officers detained and searched the appellant, the five (5) or six (6) Black males, and two (2) other individuals named Sims Walker and Bobby Lee Freeman.

The law enforcement officers convergedupon the restaurant and its

parking lot because Sims Walker and Bobby Lee Freeman had just completed the sale of one (1) kilogram of cocaine to a confidential informant inside of an automobile parked on the other side of the McDonald's parking lot. Unknown to Sims Walker and Bobby Lee Freeman, the informant had recorded telephone conversations between he and Sims Walker in which they discussed the sale of cocaine.

On February 26, 1990, Investigator, Robert Partain of the Richmond County, Georgia Sheriff's Department Narcotics Unit, requested the informant to contact Sims Walker to arrange for the undercover purchase of cocaine. In a recorded telephone conversation of February 26, 1990, Sims Walker agreed

to sell cocaine to the informant in an amount two (2) or three (3) times greater than had been exchanged on prior occasions. The following day, on February 27, 1990, again in a recorded telephone conversation, the informant expressed to Walker his desire to purchase two (2) kilograms of cocaine. Following several interruptions during the conversation in which Walker conversed on another telephone with an unknown person, Walker told the informant that his source could provide only one (1) kilogram of cocaine at that time. Walker and the informant agreed to make the exchange for a specific price, and agreed to make the exchange that same day at a McDonald's restaurant in Augusta,

Georgia.

Richmond County police officers, along with agents from the Drug Enforcement Administration (DEA), then set up a surveillance at the McDonald's restaurant. The informant was "wired" so that the officers would have an audio recording of the conversation during the exchange. The officers also established video tape surveillance in the parking lot where the informant was to park his automobile. The officers anticipated that once the exchange took place, they would arrest Walker at the informant's automobile.

At the agreed time, Walker and another individual named Bobby Lee Freeman, approached and entered the

informant's automobile. During their conversation, the officers overheard Walker state "Uh huh. He around there." Walker also stated that he was just a courier and that after the exchange, he was going to take the money right back to the source of the cocaine. As a result of Walker's statements, the officers concluded that the source of the cocaine was nearby, and that other persons were involved with Walker and Freeman.

Following the exchange of the money for the cocaine, but before the officers could arrest Walker and Freeman at the informant's automobile, Walker and Freeman exited the automobile and entered the McDonald's restaurant. For approximately one (1) minute, the

officers lost sight of Walker and Freeman, but located them on the other side of the restaurant in the parking lot walking towards the appellant and the group of five (5) or six (6) Black males. At that time, fifteen (15) officers and agents converged upon the restaurant and its parking lot.

Investigator Partain observed Walker and Freeman walking in the appellant's direction, and making some gestures that he was unable to make out. At that time, the officers detained Walker, Freeman and the five (5) or six (6) Black males who were in the parking lot. The officers detained the men because they did not know the exact whereabouts of the Twenty Six Thousand Dollars ($26,000.00) that was given to

Walker by the informant. The officers were directed to frisk all of the individuals for weapons. Investigator Partain frisked Walker and found the money in Walker's possession.

One of the officers was directed to stop and frisk the appellant. The officer detained the appellant, and began to search the appellant, looking for drugs, and not a weapon. During the search of the appellant, the officer felt a soft object in the Appellant's right shirt pocket, and pulled out a small plastic bag containing white powder. The seizure of the plastic bag and its contents resulted in the appellant's arrest, and subsequent indictment.

B. The Proceedings Below

On July 12, 1990, the Grand Jury for the United States District Court for the Southern District of Georgia returned a true bill of indictment charging the Appellant, ARTHUR ALVIN FAMBRO, in Count 1 with conspiracy to distribute cocaine base on February 27, 1990 in Richmond County, Georgia, and in Count 2 with aiding and abetting distribution of the controlled substance. The appellant entered a plea of not guilty to the indictment.

On October 23, 1990, the appellant filed his Motion to Suppress the evidence unlawfully seized from his person on the date of his arrest, and the evidence derived therefrom. On October 31, 1990 and November 2, 1990,

the suppression hearing was held before a Magistrate for the United States District Court of the Southern District of Georgia, Augusta Division. The Magistrate issued his report and recommendation to the District Court Judge that the appellant's Motion be granted.

On November 5, 1990, the District Court Judge held a hearing concerning the Magistrate's report and recommendation without eliciting any sworn testimony. The District Court Judge modified the Magistrate's findings, and concluded that the arrest and search of the appellant was supported by probable cause. The District Court Judge denied the appellant's Motion to Suppress.

The appellant thereafter entered into a negotiated plea agreement with the Government, reserving his right to appeal the denial of the Motion to Suppress by the Disrict Court. The presiding District Court Judge accepted guilty plea, and subsequently sentenced the appellant to a term of imprisonment.

On November 8, 1990, the appellant timely filed his Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit. On May 24, 1991, a three (3) judge panel of that Court issued its opinion affirming the District Court's denial of appellant's Motion to Suppress.

The appellant timely filed a Petition for Rehearing in the Court of

Appeals. On July 24, 1991, the Court of Appeals denied appellant's Petition for Rehearing.

This Petition follows.

## REASONS FOR GRANTING THE WRIT

**1. The decision below allows law enforcement officers to use a warrantless search, unsupported with probable cause to arrest, to stop a person and conduct more than a pat-down for a weapon based upon mere suspicion.**

Since this Court's decision in Terry v. State of Ohio, 391 U.S. 1 (1968), it has been clear that the Fourth Amendment to the United States Constitution does not forbid all searches and seizures, but only those searches and seizures that are unreasonable. The reasonableness of a search and seizure that falls short of the probable cause standard to arrest for having committed or committing a crime must be viewed in light of the articulable or founded suspicion of criminal activity. Although there is

no "bright line" test to evaluate the reasonableness of a search and seizure, this Court stated in Camara v. Municipal Court, 387 US. 523, 534-535, 536-537 (1967) that it is necessary to balance the need for the official intrusion against the invasion which the search or seizure entails.

If the seizure is a formal arrest, the police have an automatic right to conduct a full-blown search of the person arrested and the physical area in which a person might grab a weapon or destroy evidentiary items. On the other hand, if the seizure is a temporary detention for investigation, the police may only conduct a carefully limited, self protective search of

the outer clothing of such person to discover the presence of weapons; moreover, this limited search does not automatically follow upon a temporary detention, but can only be accomplished based on articulable or founded suspicion that the person detained is armed. The Court of Appeals has sharply departed from the law of this Court.

In order to uphold the search and seizure, the Court of Appeals had to find that the police had an articulable or founded suspicion that the appellant was armed, or in the alternative, that the police had probable cause to arrest. The former finding was not possible because the police officer stated that he was looking for drugs, and not

weapons. The Court of Appeals, instead, chose to uphold the search and seizure on the basis of a search incident to a lawful arrest. Unfortunately, the Court of Appeals was never able to convincingly point to "probable cause for the arrest."

It is axiomatic that an incident search may not precede an arrest and serve as part of its justification. Johnson v. United States, 333 US. 10, 16-17 (1948). The police officer that searched the appellant's shirt pocket had no prior and/or contemporaneous knowledge that the appellant had committed or was committing a crime. The police officer had no more than "mere suspicion" that the appellant may have been or was participating in

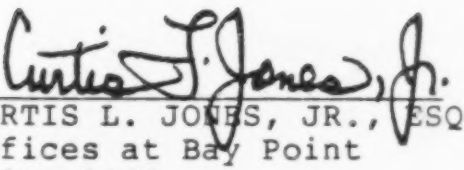
some criminal activity involving narcotics. The Court of Appeals simply fashioned a result that is not supported by the record.

## CONCLUSION

This Court has consistently exercised its supervisory power over the lower courts to ensure that the constitutional rights of all citizens will be safeguarded against governmental infringement. In that regard, this Court has fashioned the Exclusionary Rule to "balance the need of law enforcement agencies to ferret out criminal activity against police conduct which trenches upon Fourth Amendment rights." Sibron v. State of New York, 392 U.S. 40, 61 (1968). The decision by the Court of Appeals is sweeping in that it approves of police searching and seizing a person where there is no basis for an investigatory

stop and pat-down for weapons, and where no probable cause to arrest exists. We submit that such a sweeping change in the law demonstrates the need for review of the case by this Court.

Respectfully submitted,



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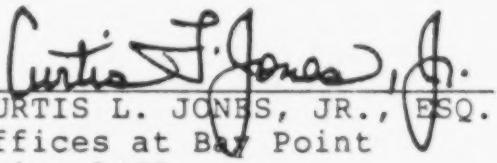
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit was sent by first-class mail to J. Michael Faulkner, Esq., Assistant United States Attorney for the Southern District of Georgia, United States Department of Justice, P.O. Box 2017, Augusta, Georgia 30903, and the Solicitor General, Department of Justice, Washington, D.C. 20530, this 22nd day of October, 1991.



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# APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 90-9047

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARTHUR ALVIN FAMBRO,

Defendant-Appellant.

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On Appeal from the United States
District Court for the Southern
District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion May 24, 1991, 11th Cir., 19__ ____ F.2d _____).

Before: TJOFLAT, Chief Judge, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

ORD-42
(9/90)

# APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 90-9047
Non-Argument Calandar

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D.C. Docket No. CR190-028

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARTHUR ALVIN FAMBRO,

Defendant-Appellant.

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Appeal from the United States District Court for the Southern District of Georgia

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(May 24, 1991)

Before TJOFLAT, Chief Judge, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

Appellant Arthur Alvin Fambro entered a conditional plea of guilty to the charge of conspiring to possess cocaine base with intent to distribute. The district court denied his motion to suppress certain evidence, and Fambro now brings this appeal from that ruling.

The facts in this case are not seriously in dispute. On February 26 and 27, 1990, law enforcement officials, acting through a confidential informant, arranged to purchase a large amount of cocaine from one Sims Walker. The informant and Walker agreed to consummate the deal on February 27 in the parking lot of a McDonald's restaurant. Police officers set up surveillance of the restaurant parking lot, arranged to

videotape the area, and equipped the informant with a transmitter and $26,000.00 to purchase the cocaine. Walker, accompanied by another man, entered the parking lot, met with the informant in his parked car, and began discussing the details of the pending transaction, including price and amount. During the brief conversation, Walker indicated that he was merely acting as a shuttle between the informant and the source of the cocaine and implied that the source was in the immediate vicinity by saying, "he around there." Walker then gave the informant approximately one kilogram of cocaine and received the money.

The police officers had originally intended to arrest Walker and his com-

panion in the informant's car, but the two men left the car before the principal surveillance officer could signal the officers to move in. Walker put the $26,000.00 in his waistband at the back of his shirt, and the two men walked into the restaurant. Less than a minute later, the police observed Walker in the parking lot on the other side of the restaurant as he approached Fambro and a small group of men and appeared to be talking to Fambro from a distance of about two feet.

A large number of officers approached this group with weapons drawn, identified themselves, and detained and frisked each of the six men. One of the officers recovered the $26,000.00 from Walker's person, while

Officer Hayes, on the orders of a supervising agent on the scene, accosted Fambro as he was walking across the parking lot between two vehicles. While conducting a frisk for weapons, Officer Hayes noticed a "soft feel[ing]" plastic bag in Fambro's shirt pocket and retrieved it from this pocket because he believed that it contained drugs. The bag contained pieces of white compressed powder that appeared to be cocaine.

Following an evidentiary hearing, the magistrate concluded that Officer Hayes' search of Fambro's shirt pocket for the plastic bag had exceeded the scope of a reasonable patdown for weapons. The district court, however, rejected the magistrate's conclusions

and held that the police had sufficient probable cause that Fambro was involved in the cocaine deal and that they could have searched him incident to a lawful arrest.

Pursuant to a valid warrantless arrest supported by probable cause, police officers may conduct a full search of the arrestee for weapons and evidence.[1] In this case, we believe that

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1 See United States v. Robinson, 414 U.S. 218, 234, 94 S.Ct. 467, 476, 38 L.Ed. 2d 427 (1973).

the district court correctly concluded that the officers had probable cause to arrest Fambro. From the monitored conversation inside the informant's car, the officers learned that Walker was only a courier of the cocaine and that the actual supplier might be in the immediate vicinity of the restaurant. After consummating the transaction, the officers observed Walker speaking with Fambro and could have reasonably assumed that Fambro was involved with the underlying transaction. In addition, during the critical seconds between when Walker entered the restaurant and when he was discovered in the opposite parking lot talking to Fambro, the police lost track of the $26,000.00 in currency and could have assumed

that it was with one of the men in the parking lot. Thus, viewing the totality of the circumstances as perceived by the officers at the time of the arrest, we find that there was probable cause to support Fambro's warrantless arrest. As a result, Officer Hayes' search of Fambro and subsequent recovery of the cocaine did not violate the fourth amendment because it was incident to a lawful arrest.[2]

Invoking the ubiquitousness of the fast food industry in American life, Fambro contends that there could have been a number of innocuous reasons why

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[2] See Rawlings v. Kentucky, 448 U.S. 98, 111 & n.6, 100 S.Ct. 2556, 2564 & n.6, L.Ed. 2d 633 (1980).

he was at the McDonald's restaurant at the time and place of the drug transaction or why he was found speaking with Walker in the parking lot. As a result, he contends we are governed by those cases in which it has been held that a defendant's mere association[3] or propinquity[4] to others independently suspected of criminal activity is insufficient to establish probable cause to search. We disagree. In this case, the police had reason to believe that Walker's supplier was in the vicinity

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[3] See, e.g., Sibron v. New York, 392 U.S. 40, S.Ct. 1889, 20 L.Ed. 2d 917 (1968).

[4] See, e.g., Ybarro v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed. 238 (1979).

of the restaurant and that Walker intended immediately to hand over the proceeds of the deal to that supplier. They could have therefore reasonably concluded that the first person that Walker was seen speaking to, less than a minute after the transaction, might indeed be that supplier.

For the foregoing reasons, the district court's denial of Fambro's motion to suppress is AFFIRMED.

# APPENDIX C

UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF GEORGIA

AUGUSTA DIVISION

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| V. | ) | CR 190-28 |
| | ) | |
| SIMS WALKER, BOBBY LEE FREEMAN, AND ARTHUR LEE FAMBRO | ) | |

ORDER ON DEFENDANT FAMBRO'S MOTION TO SUPPRESS

The United States Magistrate reported to the Court on November 2, 1990 and recommended that defendant Fambro's Motion to Suppress be GRANTED. The United States has objected to said report and rquested review de novo.

The Court has considered the pleadings filed in this matter and recordings of testimony taken before

the Magistrate. On November 5, 1990, the Court heard argument of counsel and announced findings of fact and conclusions of law, which are incorporated herein by reference.

The Court has modified the Magistrate's findings in part, as announced at the hearing on Novmember 5th, and concludes that the arrest and search of defendant Fambro on February 27, 1990 was supported by probable cause.

The Motion to Suppress evidence seized in that search, and evidence derived therefrom, is DENIED accordingly.

SO ORDERED this 5th day of November, 1990, at Augusta, Georgia.

DUDLEY H. BOWEN, JR.
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA

PRESENTED BY:

J. Michael Faulkner
Assistant United States Attorney

# APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

AUGUSTA DIVISION

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| UNITED STATES OF AMERICA | ) | |
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| V. | ) | CR 190-28 |
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| ARTHUR ALVIN FAMBRO, et al.) | | |

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MAGISTRATE'S REPORT AND RECOMMENDATION

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Defendant Arthur Alvin Fambro has moved to suppress a search of his person conducted by law enforcement officers on February 27, 1990, following the sale of a kilogram of cocaine by defendant Sims Walker to a Richmond County Sheriff's Department informant. Fed.R.Crim.P. 12(b)(3). The frisk of defendant's person, approximately a

minute and a half following the sale of cocaine by Walker to an informant, took place at a location other than the immediate site of the above sale, and resulted in a Richmond County Sheriff's Department Deputy finding a small plastic bag containing a white substance in Fambro's shirt pocket. Fambro contends the actions of the officer were unreasonable, inasmuch as there were no facts to show that the officer was in physical risk of harm to himself or others, and additionally there is no reasonable suspicion to suspect that he had committed an offense. The government maintains that the actions of the officers were reasonable and justifiable and that the motion to suppress is unfounded.

Investigator Robert Partain of the Richmond County Sheriff's Department Narcotics Unit on February 26, 1990 requested his confidential informant, Sherrod Martin to contact an individual by the name of "Cowboy" to arrange for the undercover purchase of cocaine.[1] In a recorded phone conversation of February 26, 1990, Walker expressed a willingness to sell cocaine to Martin in an amount two or three times greater than had been exchanged in the past. The following day, on February 27, 1990, again in a recorded conversation the informant expressed to Walker his desire to buy two kilograms of cocaine.

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[1] Cowboy is defendant Sims Walker.

During that conversation Walker indicated that he had just "beeped" his source and was expecting him to call back in a minute. Further, during that conversation, Walker informed Martin, following a pause in the conversation, that his source could only provide one kilogram at that time. Walker made a further pause in the conversation following his discussion with Martin concerning the price for the cocaine, and returned to Martin and told him that the exchange would be ready at 4:00 o'clock the next day at the meeting place where they last got together, a McDonald's restaurant in Augusta, Georgia.

Richmond County Sheriff's officers then set up a surveillance the following

day at the McDonald's where the drug transfer was to take place. The informant was wired so that officers would have an audio recording of the conversation during the sale. A video tape surveillance was also established at the location at the McDonald's where Martin was to park his car. The officers anticipated that once the exchange took place between Martin and Walker, they would move in and arrest Walker at Martin's automobile.

Walker, and another individual by the name of Freeman, approached and entered Martin's automobile at around 4:00 o'clock on February 27, 1990 in the McDonald's parking lot. During their conversation, Walker is overheard to state that, "Uh huh. He, he around

there." Thereafter, the conversation contains a reference by Walker that he has nothing to do with the substance, meaning cocaine, and that he was, in essence a mere courier, taking the product to Martin, getting the money and taking it straight back to his source. As a result of the latter conversation, plus the earlier remark about another individual possibly being around in the area, law enforcement officers concluded that the source was close at hand, and that there may have been others involved with Walker at the time of their surveillance.

Following the exchange of money for the drugs, but before officers could move in on Martin's car and make the

arrest, Walker and his companion, Freeman, got out of Martin's car and entered the McDonald's restaurant. For approximately one minute, officers lost sight of Walker and Freeman, but located them on the other side of McDonald's walking in a parking lot towards a group of five or six black males. At that time, 15 agents converged upon the restaurant and its parking lot.

Investigator Partain observed Walker approaching in the direction of Fambro, making some gestures that he was not able to make out. At that time, the arresting officers detained Walker, Freeman and the five or six other black men who were in the McDonald's parking lot. Officer Partain testified that all the male individuals were detained

because at that point they did not know the exact whereabouts of the $26,000 used in the drug purchase. Officers were directed to frisk all six individuals for weapons. Officer Partain frisked defendant Walker and found on him the $26,000 in United States currency. Partain described the bundle of currency as being the approximate size of a common brick, somewhat bulky in nature.

One of the five to six black men whom officers observed Walker and Freeman approaching within a minute of the drug sale was defendant Arthur Fambro. Richmond County Deputy Sheriff, Harvey Randall Hayes, at that time a uniform traffic deputy assigned to assist in the take-down, entered the

McDonald's parking lot and was directed by Drug Enforcement Administration (DEA) Agent Pat Clayton to grab defendant Arthur Fambro and detain him. Hayes then began to frisk Fambro. In his testimony of November 2, 1990, Hayes stated he was looking for drugs. In his weapons pat-down, Deputy Sheriff Hayes in patting Fambro's chest area felt a soft object in Fambro's shirt pocket, and pulled out what looked like a small plastic bag containing a white powder or substance. Hayes pulled the soft object out believing it was drugs. He does not contend it felt like a weapon. It is this item of evidence which defendant Fambro contends was unreasonably taken from him in violation of the provisions of the Fourth

Amendment.

The issue presented is whether the actions of Officer Hayes were reasonable under totality of the circumstances. Was the extent of the intrusion, that is namely, the officer's reaching into Arthur Fambro's front shirt pocket and pulling out what had been felt as a soft object, reasonable under the circumstances? The evidence is without conflict that up until the time Officer Hayes found what appeared to be a white substance in a plastic bag in Fambro's shirt, Richmond County deputies had no reasonable suspicion that Fambro had been engaged in any criminal activity at that time, or in conjunction with the Walker-Freeman-Martin transaction completed moments before. The

evidence does not establish that any of these five males who were in somewhat of a group in the parking lot of the McDonald's restaurant when observed by officers were identified as known drug distributors or individuals with assaultive tendencies or violent behavior. Both officers Partain and Hayes testified that experience has shown them that weapons could be found on individuals who have just transacted a drug purchase. In this instance no weapons were found.

At the time Walker and Freeman were placed under arrest, and the other five or six individuals were detained, law enforcement officers had weapons drawn on this group of individuals. At the time that Officer Hayes frisked

Arthur Fambro, he observed him to be walking away from the group of five black males, his hands were not in his pockets, nor did it appear that he was trying to get rid of anything from his person. It appears that the primary motivation of the agents in patting down not only defendant Walker and Freeman, but the other five to six males observed in the McDonald's parking lot shortly after the drug sale was in order to recover the $26,000 which Martin had given to Walker. The other motive for deterring these six other individuals was to check for weapons to insure the safety of the officers in arresting Walker and Freeman.

The government maintains that it was

not unreasonable for it to conclude that since Freeman and Walker were walking toward this group of six individuals in the McDonald's parking lot, that given Walker's earlier conversation, they could infer or conclude that the source of the narcotics just sold was in the vicinity, particularly since Walker was overheard to state that he did not hang on to either the money or the narcotics for very long. The government further maintains that it was reasonable for them to conclude that Walker was about to divest himself of this $26,000 because the individual who had driven him to the transaction location was parked on the other side of the McDonald's building. The government further maintains that since Officer

Hayes knew the arrest was for drugs that removing the soft packet from Fambro was not unreasonable.

In Terry v. State of Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968), the Supreme Court recognized a narrow exception to the general requirement that probable cause for arrest exist prior to search by a law enforcement official. This narrow exception exists in the case where there is reasonable suspicion to believe that a person is armed and presently dangerous. The Supreme Court applied a balancing test, weighing the need to search against the invasion of the individual which the search entails. In justifying a particular intrusion, a police officer must be able to point

to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. Reid v. Georgia, 448 S. Ct. 438, 100 S.Ct. 2752, 65 L.Ed. 2d 890 (1980); United States v. Bonds, 829 F. 2d 1072 (11th Cir. 1987). "[A] law enforcement officer, for his own protection and safety, may conduct a pat-down to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted." Ybarra v. Illinois, 444 U.S. 85 93, 100 S.Ct. 338, 343, 62 L.Ed. 2d 238 (1979). In Terry, supra, the Supreme Court found that the officer had an immediate interest in determining whether the persons whom the officer reasonably suspected of

planning a hold-up of a store were armed so as to avoid unnecessary risk.

The Supreme Court in Terry went on to consider the nature and quality of the intrusion on individual rights which must be accepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest is lacking. In terms of the individual's interest, the Court recognized that even a search of outer clothing for weapons constitutes a severe intrusion upon personal security. In Terry as in this case, where the sole justification for search was the protection of the officers and others nearby, the Court determined that the search must "be confined in scope to an intrusion reasonably de-

signed to discovering guns, knives, clubs, or other hidden instruments for the assault of the police officer." 392 U.S. at 29, 88 S.Ct. at 1884. In other words:

> A search for weapons in the absence of probable cause to arrest...must, like any other search, be strictly circumscribed by the exigencies which justify its initiation... Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby...

United States v. Robinson, 414 U.S. 218, 227-28, 94 S.Ct. 467, 473, 38 L.Ed. 2d 427 (1973). The search performed by the officer in Terry was held to be within these bounds insofar as the officer patted down the outer clothing and did not place his hands in the individuals' pockets or under the outer

surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. The officer confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons.

It is crucial that the officer in Terry did not conduct a general exploratory search for whatever evidence of criminal activity he might find. The Supreme Court explicitly stated that such a search performed absent probable cause for arrest is not justified by any need to prevent the disappearance or destruction of evidence of crime; instead, the sole justification of such a search is the protection of the officer and others

nearby. 392 U.S. at 29, 88 S.Ct. at 1884. "Nothing in Terry can be understood to allow a generalized 'cursory search for weapons' or, indeed, any search whatever for anything but weapons." Ybarra, 444 U.S. at 93-94, 100 S.Ct. at 343.

In Sibron v. State of New York, the Supreme Court held that assuming that the officer had adequate grounds to search an individual for weapons, reaching directly into an individual's pocket and pulling out an envelope of heroin was clearly unrelated to the justification as to render the heroin inadmissible. 392 U.S. 40, 65, 88 S. Ct. 1889, 1904 (1968). The Court in Sibron went on to state that the officer "was looking for narcotics, and

he found [illegible]m. The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception - the protection of the officer by disarming a potentially dangerous man." Id. In a similar case involving a warrantless search, the Seventh Circuit noted:

> Even if such a 'pat-down' could have been justified by fear that one who allegedly tried to use a stolen credit card might be armed, [the officer's] reaching into [defendant's] pockets and extracting the credit card went beyond the permissible scope of a non-arrest 'pat-down' for weapons.

United States v. Wilson, 479 F.2d 936, 939 (7th Cir. 1973) (citing Terry, supra). In contrast to these decisions, as the government has pointed out, the

Illinois Appellate Court recently held that an officer reasonably believing an object in defendant's pocket, which was rectangular and measured about one and one-half inches long and one-forth inch thick, to be a razor blade was in justified the seizure of the object which was in fact a small envelope of cocaine. People v. Day, No. 4-90-0033 (Ill.App.Ct. September 6, 1990), 560 N.E.2d 482 (1990).

Turning to the facts in the case at bar, I find from the evidence presented that given the nature of a drug transaction, and the experience of law enforcement officers that firearms are frequently associated with such transactions, that it was not unreasonable

for the officers in their attempt to insure that their arrest of Walker was peaceful to temporarily detain and pat-down for weapons the five to six males towards whom Walker was approaching when the police arrived. I further find that the primary motivation for the detention of all the individuals was for the deputy sheriffs to recover the $26,000 in purchase money. This purpose is outside of the narrow exception created by Terry which allows an officer to pat-down an individual for weapons when there is a reasonable suspicion that the individual may be armed and presently dangerous but no probable cause for arrest exists. Rather, the only justification for such a search is to protect the officers

and others in the vicinity of the arrest. Security concerns by the officers to insure that the other individuals did not interfere with the arrest of Walker justifies the temporary stopping and searching for weapons.

There is a vast difference between a weapon and a soft plastic bag. The extent of intrusion allowed in such a search is strictly limited to one calculated to reveal the presence of weapons and may not be a general exploratory search to reveal whatever evidence of criminal activity that may be found. Under the facts and circumstances of the evidence presented, the exuberance of Officer Hayes appears to have caused him to be inclined to remove every item from Fambro's clothing.

Hayes was recalled to the stand on November 2, 1990 to be questioned about whether he removed any other objects from Fambro's person while looking for weapons. He did not. I find that Officer Hayes, knowing this was a drug arrest, was looking for drugs more than for weapons. Thus, this case is distinguished on the facts of People v. Day, supra, in which the Illinois Appellate Court ruled that the officer reasonably thought the item might be a razor blade and was therefore justified in determining its identity; in this case, a soft packet was detected, and Hayes does not contend that he thought it was a weapon of any sort. It appears that discretion was not used when the soft object in Fambro's pocket was ob-

viously not a weapon. I do not believe that the officer even thought about whether the item was a weapon or not, but simply reached into the pocket to pull out to see what, if anything, was in the pockets of Mr. Fambro. Under these circumstances, I find that the search of Fambro's pocket was an unreasonable intrusion and constituted an unwarranted invasion of defendant's person. The officer was fully justified in searching for weapons, but not in removing this soft object from defendant's pocket, as the very feel of the object should have told this officer that it was not a weapon.

For the foregoing reasons, I FIND AND RECOMMEND that the search of defendant Fambro's person violated de-

fendant's rights under the Fourth Amendment to be free from illegal search and seizure. In order to make effective this fundamental constitutional guarantee direct and indirect products of such unlawful invasions cannot constitute proof against the victim of the search. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1973). Therefore, the motion to suppress evidence obtained by the government as a result of this search must be GRANTED.

Not addressed in this Report and Recommendation, but closely associated is the subsequent arrest and incriminating statements taken from Fambro. Defendant argues that as a result of the illegal search, and following

arrest, any subsquent oral or written incriminating statement must also be suppressed. I have reserved a ruling on this aspect of the motion to give the United States an opportunity to appeal my recommendation regarding the search of Fambro's person on February 27, 1990. Should the Court concur with my findings, it should be aware that following defendant's arrest at approximately 4:28 p.m., he was taken into custody. At 5:51 p.m., after an oral advisement of his Miranda[2] rights

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[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 2d 694 (1966).

by officers, an incriminating admission resulted. At approximately 6:48 p.m., February 27, 1990, while still in police custody, and after another advisement of his rights, Fambro gave a written confession. It does not appear that police custody was broken, or that Fambro had assistance of counsel, nor had he been given an opportunity to speak with family members. The mere recital of one's Miranda rights has generally been held insufficient to attenuate any initial taint, as well as the mere passage of time. Taylor v. Alabama, 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed. 2d 314 (1982); Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed. 2d 824 (1979); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254,

45 L.Ed. 2d 416 (1975). The burden is upon the government to show that there has been a sufficient break in the casual connection between the illegality and the confession. This has yet to be shown.

SO REPORTED AND RECOMMENDED at Augusta, Georgia, this 2nd day of November, 1990.

JOHN W. DUNSMORE, JR.
UNITED STATES MAGISTRATE

No. 91-769

# In the Supreme Court of the United States

OCTOBER TERM, 1991

ARTHUR ALVIN FAMBRO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether there was probable cause to support the warrantless arrest of petitioner in the immediate vicinity of a just-completed drug transaction.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B10) is unreported, but the judgment is noted at 935 F.2d 1296 (Table).

### JURISDICTION

The judgment of the court of appeals was entered on May 24, 1991. A petition for rehearing was denied on July 24, 1991. Pet. App. A1-A2. The petition for a writ of certiorari was filed on October 22, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following his conditional plea of guilty in the United States District Court for the Southern District of Georgia, petitioner was convicted of conspiracy to distribute cocaine base, in violation of 21 U.S.C. 846. The district court sentenced him to a term of 170 months' imprisonment, to be followed by a five-year period of supervised release, and fined him $5,000. The court of appeals affirmed.

1. The evidence adduced at a pretrial suppression hearing showed that on February 26, 1990, Sherod Martin, a confidential informant, telephoned Sims Walker to arrange a multi-kilogram purchase of cocaine. Walker told Martin to contact him the next day about the cocaine purchase. The following day, Martin contacted Walker by pager. Walker called Martin back two minutes later. The two men agreed that they would meet at approximately 4:00 p.m. at a local McDonald's restaurant and that Martin would purchase one kilogram of cocaine for $26,000. Pet. App. B2; Gov't C.A. Br. 2-3.

Police officers went to the restaurant, established surveillance, and arranged to videotape the side of the restaurant where Martin was to park. They also equipped Martin with a transmitter and gave him $26,000. After Martin parked at the restaurant, a woman drove up with Walker and a second man, Bobby Lee Freeman. Walker and Freeman got into Martin's car and discussed details of the cocaine transaction, including price and amount. Walker indicated that his supplier was nearby. He also implied that he had just obtained the cocaine, saying that he had picked it up, had not touched it, but had brought it directly to Martin. Walker then gave Martin the

cocaine in exchange for $26,000. Pet. App. B2-B3; Gov't C.A. Br. 3.

The police officers had planned to arrest Walker and Freeman while they were in Martin's car, but the two men left the car before the principal surveillance officer signaled the police to move in. Walker and Freeman entered the McDonald's restaurant. A minute later, the officers saw Walker, Freeman, petitioner, and three other persons in the parking lot on the other side of the restaurant. Walker was speaking to petitioner. The officers identified themselves, and not knowing where the $26,000 was, attempted to detain all six of the persons in the parking lot. The officers observed petitioner walking away and stopped him. Pet. App. B3-B5; Gov't Br. 3-4.

While patting petitioner down, a police officer felt a soft object in petitioner's front shirt pocket. Thinking that the object was drugs, the officer removed it from petitioner's pocket. The object was a small plastic bag containing pieces of white compressed powder that appeared to be cocaine. Petitioner was arrested and charged with possession of cocaine. Approximately two and a half hours later, after he had been advised of, and waived, his constitutional rights, he gave agents a statement admitting that he had helped to obtain the cocaine used in the Walker-Martin transaction. Pet. App. B5. Gov't C.A. Br. 4-5.

2. A magistrate judge recommended that the district court grant petitioner's motion to suppress the cocaine found in his shirt pocket. He reasoned that until the seizure the officers had no reasonable suspicion that petitioner had engaged in any criminal activity, including the just-completed one-kilogram cocaine transaction. Pet. App. B5, D1-D29.

The district court disagreed. The court found that there was an ample showing of probable cause to believe that petitioner was involved in the drug transaction. The court concluded that if there was probable cause to arrest, the associated search was permissible. Pet. App. B5-B6, C1-C3. See Gov't C.A. Br. 7-8.

3. The court of appeals affirmed. Pet. App. B1-B10. That court agreed with the district court that in light of "the totality of the circumstances as perceived by the officers at the time of the arrest, * * * there was probable cause to support [petitioner's] warrantless arrest." *Id.* at B8. It concluded that the search of petitioner's person and the confiscation of the cocaine did not violate petitioner's rights because the search "was incident to a lawful arrest." *Ibid.*, citing *Rawlings* v. *Kentucky*, 448 U.S. 98, 111 & n.6 (1980). The court of appeals rejected petitioner's contention that the search was unlawful because it was based on his mere association with, or proximity to, others independently suspected of criminal activity. Pet. App. B9. The court observed that because "the police had reason to believe that Walker's supplier was in the vicinity of the restaurant and that Walker intended immediately to hand over the proceeds of the deal to that supplier," they could have reasonably concluded that "the first person that Walker was seen speaking to, less than a minute after the transaction, might indeed be that supplier." *Id.* at B9-B10.

## ARGUMENT

Petitioner contends (Pet. 17-21) that the warrantless search of his person was unreasonable under the Fourth Amendment because it was not supported by probable cause, but instead was based on mere suspicion. That contention is without merit and presents no issue warranting this Court's review.

The principles governing this case are well settled. Law enforcement officers may make warrantless arrests if they have probable cause to believe that the suspect has committed or is committing a crime. *United States* v. *Watson*, 423 U.S. 411, 415-417 (1976); *Gerstein* v. *Pugh*, 420 U.S. 103, 113 (1975). Probable cause to arrest exists when the facts and circumstances at hand would lead a prudent person to conclude that it is likely that an offense has been or is being committed. See *Brinegar* v. *United States*, 338 U.S. 160, 175-176 (1949). The probable cause determination is based on the totality of the circumstances, viewed in a nontechnical, common sense, and practical manner. See *Illinois* v. *Gates*, 462 U.S. 213, 230-232 (1983).

Once police officers have made a valid arrest, they may conduct a warrantless search of the suspect. *New York* v. *Belton*, 453 U.S. 454, 461 (1981); *Michigan* v. *DeFillippo*, 443 U.S. 31, 35 (1979). While the authority to make a search incident to an arrest derives from a police officer's general need to disarm suspects or preserve evidence, *United States* v. *Robinson*, 414 U.S. 218, 234-235 (1973), the legality of the search depends only on the legality of the arrest, *id.* at 235. When police make a search incident to an arrest, they are not limited to a weapons pat-down of the sort that is permissible during an investigative detention, but may conduct a full search for weapons and evidence. *Id.* at 229, 235.

In the present case, as both of the courts below correctly found, the officers had probable cause to arrest petitioner. From the conversations they had monitored, the officers knew that Walker had just completed a $26,000 drug transaction and that Walker's supplier was likely to be in the immediate vicinity of the McDonald's restaurant. Only a minute after the transaction, they saw Walker speaking to petitioner in the restaurant parking lot, and they then saw petitioner attempt to leave when the police arrived. Those facts and circumstances were sufficient to establish probable cause to believe that petitioner was involved in the drug transaction. See *Brinegar* v. *United States*, 338 U.S. at 175-176.

Because the officers had probable cause to arrest petitioner, they were entitled to detain him, search his person incident to the arrest, and seize the drugs found in his shirt pocket. *United States* v. *Robinson*, 414 U.S. at 235. The exact order of the police action in this case is immaterial. This Court has held that where the formal arrest quickly follows the challenged search, it is not important that the search preceded the arrest. See *Rawlings* v. *Kentucky*, 448 U.S. at 111. Petitioner's formal arrest occurred immediately after the search of his person and satisfied the requirement that the search incident to arrest be closely related in time to the arrest.

The cases petitioner cites (Pet. 20, 22) do not support a different result. In *Sibron* v. *New York*, 392 U.S. 40, 62 (1968), this Court held simply that the defendant's conversations with narcotics addicts did not, without more, support an inference that the defendant was engaged in drug trafficking. In *Johnson* v. *United States*, 333 U.S. 10, 16 (1948), the government effectively conceded that it did not have probable cause to arrest the defendant before it conducted

a warrantless search of her room. The instant case is quite different. Petitioner's conversation with Walker took place only a minute after a major drug transaction and shortly after Walker had given the officers reason to believe that his cocaine supplier was in the immediate vicinity. In those circumstances, as the courts below correctly ruled, the officers had probable cause to believe that petitioner was also involved in the drug transaction.*

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1992

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* Even if, as petitioner argues, the evidence known to the police just prior to the detention of petitioner had not risen to the level of probable cause, it clearly amounted to reasonable suspicion. As a result, the police were entitled to detain, frisk, and question petitioner. See *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968). When, in the course of the frisk, a police officer felt an object that he believed from his past experience to be drugs, the officer's reasonable suspicion to detain and frisk petitioner ripened into probable cause to arrest him. See 3 W. LaFave, *Search and Seizure* § 9.4(c), at 524 (2d ed. 1987). At that point, the officers were entitled to search petitioner's person incident to arrest and to seize the drugs from his shirt pocket. See *United States* v. *Buchannon*, 878 F.2d 1065, 1067 (8th Cir. 1989).

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